FILED
NOV 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-529

In The

Supreme Court of the United States

October Term, 1998

COLLEEN V. FORD,

Petitioner,

vs.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

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STATEMENT PURSUANT TO RULE 29.6

Metropolitan Life Insurance Company has no parent company; its affiliates and subsidiaries, other than wholly-owned subsidiaries are listed in Appendix A to this brief.

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APPENDIX

Appendix A — Statement Pursuant To Rule 29.6 ... 1a

Respondent Metropolitan Life Insurance Co. ("MetLife") respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit in *Ford v. Schering-Plough Corp.*

STATEMENT OF THE CASE

Petitioner Ford's claims arise out of the administration of an employee welfare benefits plan (the "Plan") provided by Schering-Plough Corporation ("Schering") to its employees, including Ford. Respondent Metropolitan Life Insurance Company ("MetLife") issued a group insurance policy to Schering to fund the long term disability ("LTD") benefits provided under the Schering Plan; MetLife also administered claims for LTD benefits under the Plan.

The insurance policy in question was not sold to the general public. At no time did Ford seek to buy or otherwise obtain any goods or services from MetLife, and at no time was she denied the opportunity to do so. The group insurance policy at issue here was available only to employers — such as Schering — as a vehicle for them to provide to their employees the level of long term disability benefits that they had decided to provide under their employee benefit plans. In this case, all Schering employees, disabled and nondisabled, were provided with the same degree of protection against the risk of becoming unable to work: the Plan provided LTD benefits for varying periods; benefits ceased after two years for an employee disabled by a mental or nervous condition who was not hospitalized, while benefits continued to age 65 for employees who could not work by virtue of physical disorders.

Ford contends that the disparity in the level of disability benefits payable for mental and physical conditions violates

the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (the "ADA"), specifically, Title I, the "employment" section of the ADA[1], Title III, the "public accommodations" section of the ADA[2], and Title V, the rule of construction (or safe harbor) for insurance plans.[3]

---

1. Title I provides in relevant part (at 42 U.S.C. § 1212(a)):

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employee's, employee compensation, job training and other terms, conditions, and privileges of employment.

2. Title III provides in relevant part (at 42 U.S.C. § 12182(a)):

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

3. Section 501(c) of the ADA, 42 U.S.C. § 12201(c), provides in relevant part:

> (c) Insurance
>
> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict —
>
> (1) an insurer . . . or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(Cont'd)

Ford filed her complaint against Schering and MetLife on April 29, 1996. MetLife and Schering filed motions to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment, on June 18, 1996. District Judge Debevoise dismissed the complaint against the defendants on September 12, 1996, holding in relevant part that: (i) Ford failed to state a claim under Title I of the ADA because she was not a "qualified individual with a disability" as that term is defined in the statute; (ii) Ford failed to state a claim under Title III of the ADA because she was not deprived of access to MetLife's goods and services; and (iii) Ford failed to state a claim under Title V of the ADA because that Title does not create an independent cause of action. *See* Slip Opinion of District Court (Pet. App. at 38a-47a).

Ford appealed to the United States Court of Appeals for the Third Circuit, which affirmed the district court's decision. Of particular relevance here, the Third Circuit held that the ADA did not prohibit employers or insurance companies from providing different levels of benefits for different conditions.

(Cont'd)

> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

"So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status," the court stated,

> then no discrimination has occurred even if the plan offers different coverage for different disabilities. The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.

Indeed, the question whether providing different levels of benefits for different broad categories of conditions constitutes discrimination on the basis of disability is not new, and the Third Circuit based its conclusion on its own precedent and the consistent holdings of this Court and the Sixth, Seventh, Eighth and D.C. Circuits. The court also relied on the compelling evidence of Congress's actions since the enactment of the ADA: twice Congress has considered, and once enacted, legislation specifically addressing the question whether employer-provided benefits for mental conditions must be identical to the benefits provided for physical conditions. On neither occasion did the Congressional debates reflect a belief that the question had already been resolved by the ADA, and on neither occasion did Congress prohibit the existing practice of providing different benefit levels for physical and mental conditions in LTD plans.

The Third Circuit further held that Schering and MetLife were not required under Section 501(c) of the ADA,[4] to present actuarial data to prove that the disparities in benefits were not a subterfuge to evade the purposes of the Act. The panel looked

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4. 42 U.S.C. § 12201(c), quoted in note 3, *supra*.

to this Court's holding in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), construing language under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), that is nearly identical to the language used in the later-enacted ADA, and the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which leaves the regulation of insurance to the states, as support for this holding. The court observed that requiring insurers to justify their policy coverage would represent a "seismic shift in the insurance business" and would improperly place the federal courts in the role of "watchdog of the insurance business."

With specific regard to Petitioner's Title III claim, the Third Circuit held that the ADA's prohibition on discrimination by "place[s] of public accommodation" was not implicated here. Title I, not Title III, governs discrimination in employment practices, and, in its sale of a group insurance plan to an employer, MetLife was functioning neither as a "place" nor as a "public accommodation," the court held. Although MetLife maintains insurance offices at which certain of its products are sold to the public, the court reasoned that no nexus existed between Petitioner, who received benefits through her employer, and MetLife's insurance offices. What the Petitioner sought here, the court concluded, was not equal access to the goods and services provided by a place of public accommodation. Rather, she sought to extend the scope of the ADA to regulate the *content* of MetLife's insurance policies which, the court held, the statute does not do.

SUMMARY OF REASONS FOR DENYING REVIEW

Arguing against the consistent holdings of four circuit courts of appeals, Ford has invoked a false conflict in an attempt to persuade this Court to expand the scope of the ADA beyond the plain meaning of the statute and the clear intention of

Congress. Ford's petition should be denied because the circuit courts have uniformly held that the ADA does not regulate the content of insurance policies and does not require benefit parity — there is no split among the circuits with regard to these issues. Indeed, the identical contention raised by Ford in this case was raised by the Petitioner in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998), which this Court declined to review.

The Third Circuit properly dismissed Petitioner's Title I and Title III claims because there was no discrimination here among Schering employees within the meaning of the ADA. All Schering employees faced some risk of becoming unable to continue to earn a livelihood by reason of disability. All Schering employees — both those fully able and those having some disability — were treated identically and given the same degree of protection against that risk. That this is not discrimination under the ADA is the precise holding of *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 and *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996).

Furthermore, the Third Circuit properly reasoned that recent Congressional consideration of legislation to require parity in insurance benefits for mental and physical illnesses conclusively demonstrates that Congress never intended the ADA to preclude such distinctions. While twice considering the issue of benefit parity after the enactment of the ADA, Congress has never extended this concept to long-term disability benefits.

Under Ford's theory, the scope of Title III of the ADA would impermissibly extend beyond the guarantee of equal access by disabled persons to the goods and services offered by places of public accommodation to regulation of the substantive content and design of those goods and services.

Courts would replace state insurance commissioners as regulators of the content and design of insurance policies, and play the role of "super-underwriters," thereby undermining the traditional and commonplace risk classification practices of insurers. There is simply no support in the ADA, nor in its legislative history, nor in its regulations, nor in the case law, for such a vast conceptual expansion of the scope of protections afforded by the ADA.

In any event, questions concerning the obligations of places of public accommodation — which Petitioner asserts (incorrectly) are worthy of this Court's review — are simply not presented in this case. The group insurance policy at issue here was sold only to employers, to provide employee benefits; it was never offered for sale to the public. Thus, this case has nothing to do with any "place" of public accommodation, and the Court would therefore never reach any questions concerning the obligations imposed by the ADA on such a "place."

Finally, to argue, as Petitioner does, that section 501(c) *expands* the scope of ADA coverage to insurance practices and the contents of insurance products rather than expressly *limiting* the coverage of the ADA (consistent with the McCarran-Ferguson Act) to exclude the traditional business of insurance, flies in the face of the plain and unambiguous statutory language and the clear intent of Congress. Even if Title V were implicated in this case, Petitioner fails to present any issue warranting discretionary review because the Third Circuit properly held, consistent with this Court's holdings and the holdings of its sister circuits, that MetLife was not required to provide an actuarial justification for its group policy that provided different levels of benefits for specified categories of conditions.

REASONS FOR DENYING REVIEW

I.

THE CIRCUIT COURTS HAVE UNIFORMLY HELD THAT THE ADA DOES NOT REQUIRE BENEFIT PARITY, AND RECENT CONGRESSIONAL ACTION SUPPORTS THIS INTERPRETATION; THEREFORE, REVIEW IS NOT WARRANTED.

Consistent with this Court's decisions under the Rehabilitation Act of 1973 (predecessor to the ADA)[5] and the decisions of the four other circuit courts to have considered the issue, the Third Circuit held that the ADA is not violated where an employer offers all its employees, whether nondisabled or disabled, the same benefit plan. It is not contested that *every* Schering employee, whether nondisabled or disabled, is treated precisely the same with respect to the Plan. Nevertheless, Petitioner urges this Court to exercise its supervisory authority and grant her petition to correct what she believes is an erroneous interpretation of the ADA. Petitioner's bare assertion of error, devoid of any legal support, does not present a compelling reason for this Court to grant review.

A. The Courts Have Consistently Held That the ADA Does Not Prohibit a Disparity in Benefits Under a Group Long Term Disability Plan So Long As That Disparity is Applied to Everyone Equally.

The LTD Plan provided by Schering offers the same degree of protection to all Schering employees — whether disabled or

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5. The ADA provides that its provisions be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973." 42 U.S.C. § 12117(b).

nondisabled. No employee was denied coverage, required to pay a higher premium, or afforded reduced benefits because that employee had a disability. Indeed, Ford does not complain that she was not provided the same plan with the same coverage and at the same cost offered to other Schering employees.

The circuit courts have repeatedly and uniformly held that the provision of different benefit levels for different broad categories of conditions — including different benefits for mental or nervous conditions compared with physical conditions — is not discrimination within the meaning of the ADA. The Third Circuit correctly concluded that (Pet. App., 15a):

> While the defendants' insurance plan differentiated between types of disabilities, this is a far cry from a specific disabled employee facing differential treatment due to her disability. Every Schering employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every Schering employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.

Considering the same Schering LTD Plan, the Sixth Circuit en banc in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d at 1015-16, held that the ADA did not prohibit Schering from providing the LTD Plan to its employees, including the provision limiting benefits for disabilities due to mental disorders, because all

employees, both disabled and nondisabled, received equal access to the benefits offered under the Plan. The Seventh Circuit in *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, also rejected the suggestion that a long-term disability plan that provided benefits to age 65 for physical disabilities but only for two years for mental or nervous disabilities violates the ADA, holding:

> [The employer] did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled. All employees — the perfectly healthy, the physically disabled, and the mentally disabled — had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous. This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

96 F.3d at 1044 (citations omitted).[6]

The Eighth Circuit reached a similar conclusion in *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674. The plaintiff there sued her employer under the ADA (among other statutes) because the company's medical insurance plan did not cover her treatments for infertility — which she challenged as "a

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6. Contrary to plaintiff's assertion, the Seventh Circuit's reliance on *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *rev'd*, 519 U.S. 337 (1997), in its discussion of the plaintiff's standing as a former employee does not undermine the court's reasoning on the entirely separate issue whether disparities in disability benefits can be considered discrimination. Moreover, far from being "discredited" (Petition, p. 20), the district court decision in *Parker* was affirmed by the en banc Sixth Circuit.

disability-based distinction." The Eighth Circuit rejected this contention, on the grounds that:

> the Plan's infertility exclusion does not single out a particular group of disabilities, allowing coverage for some individuals with infertility problems, while denying coverage to other individuals with infertility problems. Rather, the Plan's infertility exclusion applies equally to all individuals, in that no one participating in the Plan receives coverage for treatment of infertility problems.

Id. at 678. *See also Castellano v. City of N.Y.*, 142 F.3d 58 (2d Cir. 1998) (it is lawful under the ADA for an employer to offer different levels of retirement benefits to people who retire under different conditions — even though those who retire due to disability receive less than those who retire on the basis of their attainment of years of service), *cert. denied,* 119 S. Ct. 60 (1998); *Lenox v. Healthwise of Ky., Ltd.*, 149 F.3d 453 (employer-sponsored insurance plan that covered some transplants but not heart transplants did not violate the ADA).

Also particularly relevant here is the D.C. Circuit's decision in *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997). In *Modderno*, the D.C. Circuit rejected the plaintiff's Rehabilitation Act claim that different treatment of mental and physical illnesses in a health benefits plan was unlawful. The court held that such disparities are not "the sort of harm the Rehabilitation Act was intended to redress." *Id.* at 1061. The D.C. Circuit also rejected the contention (which Ford advances here) that the distinction between benefits afforded for physical and mental conditions is "facially discriminat[ory]." *Id.*

These decisions relied, in part, upon this Court's holding in *Traynor v. Turnage*, 485 U.S. 535 (1988), that the Veterans Administration did not violate the Rehabilitation Act by denying extensions of educational benefits to veterans whose disabilities were attributed to their "willful misconduct." This Court explained,

> There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.

485 U.S. at 549. *See also Alexander v. Choate*, 469 U.S. 287, 287 (1985) (Tennessee's reduction of the number of inpatient days for which Medicaid would pay, which had a disproportionate effect on disabled individuals because of their greater medical needs, did not violate the Rehabilitation Act, which "does not . . . guarantee the handicapped equal results from the provision of state Medicaid. . . .").

Federal agencies charged with the enforcement of the ADA have recognized the same principle. The EEOC, for example, has stated:

> Insurance distinctions that are not based on disability, and that are applied equally to all covered employees, do not discriminate on the basis of disability and so do not violate the ADA. . . . [*A*] *feature of some employer provided health insurance plans is a distinction between the benefits provided for the treatment of physical conditions on the one hand, and the benefits provided for the treatment of 'mental/nervous' conditions on the other. Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided of the treatment of physical conditions. . . . Such broad*

> ***based distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability.*** **Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA.**

EEOC Interim Policy Guidance, June 8, 1993, at 3 (emphasis added), reprinted in EEOC Compliance Manual (BNA) at 70:1052-53.[7]

Because the circuit courts have concluded that a disparity in benefits between mental and physical conditions does not violate the ADA, there is no compelling reason for this Court to grant review.

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7. Similarly, the Senate Labor and Human Resources Committee Report explained:

> [E]mployers may not deny health insurance coverage completely to an individual based on the persons' diagnosis or disability. For example, *while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage*, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition . . . .

S. Rep. No. 116, 101st Cong., 1st Sess., at 29 (1989) (emphasis added).

B. Recent Congressional Enactments Confirm That The ADA Does Not Require Parity Of Benefits For All Conditions.

Further, and compelling, support for the conclusion that the ADA does not require parity of benefits can also be found in more recent Congressional enactments. Particularly relevant is the history of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) ("HIPAA"). The Senate version of the bill would have prohibited an employee health benefit plan from imposing treatment limits on mental health services if similar limits were not imposed on other conditions. S. 1028, 104th Cong., 1st Sess. Amendment No. 3681 (142 Cong. Rec. S. 3670) (Apr. 18, 1996). Prior to passage of the Senate version, Senator Kennedy, one of the original sponsors of both the ADA and HIPAA, explicitly stated that mental illnesses and physical illnesses "are not treated equally under current law." 142 Cong. Rec. S. 3560-61 (Apr. 18, 1996). Similar remarks were made by Senator Wellstone, 142 Cong. Rec. S. 3530 (Apr. 18, 1996), and Senator Domenici, 142 Cong. Rec. S. 9579 (Aug. 2, 1996). Nowhere in the reported debates is there any suggestion that such benefit disparities were already prohibited by the ADA.

The House, moreover, explicitly rejected the "parity" provision in the Senate version of the bill (142 Cong. Rec. H. 6141 (June 11, 1996); *see also* 142 Cong. Rec. H. 9795 (Aug. 1, 1996)), and the law was enacted without any provision requiring parity in the benefits for mental and physical illnesses. The Congressional rejection of a parity requirement makes plain Congress' view that the ADA does not compel parity in benefits for physical and mental conditions, and surely was not meant to clear the way for the courts to do what Congress would not.

That there is no requirement of equal benefits for mental and physical conditions in a long-term disability plan was further confirmed by the enactment of the Mental Health Parity Act of 1996, Pub. L. No. 104-204, Title VII, 110 Stat. 2944 (1996) ("MHPA"), in which Congress amended HIPAA to prohibit certain — but not all — distinctions in benefits between physical and mental conditions in group health insurance plans. Not only does the enactment of MHPA make it perfectly clear that the ADA did not already prohibit such distinctions between benefits provided for mental and physical conditions,[8] MHPA is itself *inapplicable to long-term disability plans*. MHPA, § 702(a), 110 Stat. 2945. The conclusion is therefore inescapable that federal law did not, and still does not, require parity in long-term disability benefits for mental and physical illness.

Thus, the Third Circuit correctly concluded:

> Such congressional action reveals both that the ADA does not contain parity requirements and that no parity requirements for mental and physical disability benefits have been enacted subsequent to the ADA.

(Pet. App., 20a). Likewise, in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d at 1017-18, and *EEOC v. CNA Ins. Cos.*, 96 F.3d at 1044, the Sixth and Seventh Circuits, respectively, expressly relied on these legislative actions in concluding that the

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8. Members of Congress described the MHPA as the *first step* toward requiring equal health insurance benefits for the mentally disabled. 142 Cong. Rec. H. 10951, *H10957, vol. 142 no. 133 (Sept. 24, 1996); 142 Cong. Rec. H. 10951, *H10961, vol. 142 no. 133 (Sept. 24, 1996); 142 Cong. Rec. S. 11569, *S11569, vol. 142 no. 136 (Sept. 27, 1996).

provision of different long-term disability benefits for physical and mental conditions was not prohibited by the ADA.

Significantly, Petitioner does not mention this *post*-ADA legislative history or discuss this rationale for the Third Circuit's holding that the ADA does not prohibit a disparity in benefits between mental and physical conditions in long-term disability benefit plans. Given this failure and the uniform holdings of the circuit courts regarding disparities in the content of insurance plans, there is no reason for this Court to grant Petitioner's request for review.

C. Title III Requires Equal Access; It Does Not Regulate the Contents of Goods and Services.

ADA Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods [and] services . . . of any place of public accommodation . . . ." 42 U.S.C. § 12182(a). Thus, Title III provides only that disabled persons should have *equal access* to the goods and services provided in places of public accommodation. The language Congress adopted in Title III ensures that disabled persons have the same opportunity as nondisabled persons to "enjoy" those goods and services that generally are offered in places of public accommodation, and not to require any alteration of those goods and services.[9] *See* 42 U.S.C. § 12182(b)(1)(A)(iii). The legislative history of the ADA is replete with statements making clear that Congress's aim in enacting Title III was to provide equal *access* for disabled

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9. Disabled persons are afforded "the right to participate and to have an equal opportunity to obtain the same results as non-disabled individuals. It does not mean that an individual with a disability must achieve an identical result. . . ." H.R. Rep. No. 485, 101st Cong., 2d Sess., at 55 (1990).

persons to the goods and services offered by places of public accommodation. *See* H.R. Rep. No. 485, 101st Cong., 2d Sess., at 35, 71 (1990); *see also* S. Rep. No. 116, 101st Cong., 1st Sess., at 58 (1989).

Thus, while a "place of public accommodation" plainly must take statutorily mandated steps to make its premises, and the goods and services offered therein, accessible to the disabled, it is not required "to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." Department of Justice Regulations, 28 C.F.R. § 36.307(a). The rationale behind this provision is that

> [t]he purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, *not to alter the mix of goods that the public accommodation has typically provided.*

Id. (emphasis added). Examples of special goods *not* required to be provided by a public accommodation include "Brailed versions of books, books on audio-cassettes, closed captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs." *Id.*

Just as the ADA requires a bookstore to guarantee the blind *access* to its books, but does not regulate the *content* of the bookstore's inventory or require the store to offer books on audio tape or in Braille, the ADA does not require MetLife to redesign its insurance products or to create new insurance products to meet the special needs of those persons who in the future will become unable to work by reason of mental or nervous conditions. Thus, even if MetLife can be considered a place of public accommodation in the context of providing a group insurance policy to an employer to fund the employer's

employee benefit plan (which MetLife denies; *see infra* pp. 21-23),[10] Ford received *equal access* to the same benefits provided under MetLife's group policy to all other Schering employees. Accordingly, the Third Circuit correctly held that Ford failed to state a claim of discrimination cognizable under Title III.

II.

NO CONFLICT EXISTS BETWEEN THE FIRST AND THIRD CIRCUITS BECAUSE THE FIRST CIRCUIT HAS NEVER APPLIED THE ADA TO THE CONTENTS OF INSURANCE POLICIES AND DID NOT FIND THAT AN EMPLOYER-SPONSORED BENEFIT PLAN WAS A GOOD OR SERVICE OFFERED BY A PLACE OF PUBLIC ACCOMMODATION.

Petitioner contends that the Third Circuit's holding in this case conflicts with a prior holding of the First Circuit in *Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994). No conflict exists, however. *Carparts* simply declined to conclude, at the outset of the litigation, that the plaintiff could never establish that he had been denied access to a place of public accommodation. The First Circuit expressly *refused* to address the question posed by Ford in this case — whether disparities

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10. Numerous courts have held that Title I, not Title III, of the ADA governs employment practices. Pet. App., 25a; *Parker*, 121 F.3d at 1012; *Motzkin v. Trustees of Boston University*, 938 F. Supp. 983, 996 (D. Mass. 1996) ("The legislative intent is so clear from the language of Titles I and III that one need not go beyond that language to conclude that employment discrimination is the exclusive provision of Title I.").

in the *substantive content* of long-term disability plans or policies violated the ADA.[11] Nor did the court express any opinion whether an employer-sponsored benefit plan that, like the Schering LTD Plan, is not offered for sale to any member of the general public, could be considered a good or service offered by a "place of public accommodation" within the meaning of the ADA. The First Circuit simply held that under Title III of the ADA, discrimination by a "place of public accommodation" might not be limited to denial of physical entry to a structure. That question is not presented in this case. Whether Title III prohibits denial of access to a product by other than physical means is not an issue implicated here, where no one was denied a MetLife insurance product at all, at any time or for any reason.

A. The First Circuit Has Not Addressed Disparities in the Content of Insurance Policies, and the Other Circuits Have Uniformly Held, Consistent with Statutory Language and Congressional Intent, that the ADA Only Regulates Access to Goods and Services Offered by a Place of Public Accommodation.

In *Carparts*, an individual (and the company he owned) challenged a lifetime benefit limitation for AIDS-related treatments in a self-funded (*i.e.*, uninsured) medical benefit plan offered by a trade association of which his company was a member, claiming that the limitation constituted employment discrimination or discrimination by a place of public accommodation. The district court dismissed the complaint, holding, *inter alia*, that Title III of the ADA only applied to " 'actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein.' " *Id.* at 18. The First

11. Indeed, *Carparts* concerned a self-funded medical benefits plan; no insurance policy was involved.

Circuit reversed and remanded, holding that the district court had prematurely dismissed the complaint and adopted an overly restrictive definition of a "place of public accommodation." *Id* at 20. The court explicitly declined to address whether the ADA

> is intended merely to provide access to whatever product or service the subject entity may offer, or is intended in addition to shape and control which products and services may be offered.

Id. at 19. Nevertheless, petitioner misleadingly asserts that the First Circuit "did not preclude regulation of the terms and conditions of insurance products under Title III" (Petition, p. 10) and that the Third Circuit's contrary holding thus creates a conflict among the circuits. Petitioner's assertion of a conflict is clearly unfounded.

The First Circuit went to great pains to emphasize that its decision in *Carparts* was extremely narrow and tentative, and did not establish a definitive ruling on the scope of Title III. In the absence of precedents, unable to find definitive answers in the statute or its legislative history, and in light of the need to remand the case for other reasons, the court left open the possibility that the plaintiffs might be able to develop a claim. Beyond this, however, the court refused to go:

> We think that at this stage it is unwise to go beyond the *possibility* that the plaintiff may be able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I. Not only the facts, but, as we have already noted, even the factual allegations are quite sparse. In addition, because of our resolution of the Title I claims, this case must be remanded and is subject to further proceedings regardless of whether Title III remains in the case.

Id. at 20 (emphasis added). The First Circuit did not hold that an organization providing a health benefit plan to the employees of its members is a public accommodation; instead, the court remanded the case to the district court to "allow plaintiffs the opportunity to adduce further evidence supporting their view that the defendants are places of 'public accommodation' within the meaning of Title III of the ADA." *Carparts*, 37 F.3d at 19. While the courts in *Ford* and *Carparts* differed over whether a "place of public accommodation" must be physically accessed, this case does not involve denial of access, physical or otherwise. Ford had access to the same LTD Plan as all other Schering employees. Accordingly, Petitioner has failed to present a compelling reason for this Court to grant discretionary review.

B. The Schering LTD Plan and MetLife's Group Policy Were Not Provided by a "Place of Public Accommodation."

Ford's claim must also fail for the entirely independent reason that the disability insurance plan provided by Schering and funded through a MetLife group insurance policy was not offered for sale in or by a "place of public accommodation." Ford did not purchase the group insurance policy from MetLife. Nor could she have done so because MetLife did not offer the group disability policy from any MetLife insurance office which offers goods and services to members of the general public. Rather, the LTD Plan, like other group policies, is sold only to employers. In selling the group policy to Schering, MetLife acted as a wholesaler engaged in a business-to-business transaction.

As the DOJ's regulations make clear, locations in which business is conducted with other businesses — such as wholesale establishments — are not places of public accommodation. Moreover, a wholesale business is not

somehow converted into a place of public accommodation simply because it also has a retail component. "[A] company that operates a place of public accommodation is subject to [Title III] only in the operation of that place." 28 C.F.R. § 36 (App. B) at 604 (1996). As the regulations state:

> [A] company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these transactions. If this company operates a road side stand where its crops are sold to the public, [however], the road side stand would be a sales establishment covered by the ADA. . . . In [this] example . . . , the wholesale produce company that operates a road side stand would be a public accommodation only for the purpose of operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access. . . .

Id. If the operation of a retail component could convert a wholesale business into a place of public accommodation, the distinction between "commercial facilities" and "public accommodation[s]," both defined in 42 U.S.C. § 12181, and each subject to very different requirements throughout Title III, would be obliterated.[12] 28 C.F.R. § 36 (App. B) at 604

12. Although Title III extends to goods or services provided by a place of public accommodation through a contractual, licensing or other arrangement, that protection extends no further than the individuals who are "clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." 42 U.S.C. § 12182(b)(1)(A)(iv). Here, Schering purchased the Group Policy for its employees from MetLife. Therefore, Schering, not Ford, is MetLife's "client or customer" who entered into the "contractual arrangement," and Title III still does not apply to Ford's claim.

(1996) ("Of course, a company that operates a place of public accommodation is subject to this part only in the operation of that place of public accommodation.").

The Third Circuit held in this case that because Ford received her disability benefits via her employment at Schering, "she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation." (Pet. App., 26a) Similarly, in *Parker*, a case involving the identical issues and the identical disability benefits plan as the case at bar, the Sixth Circuit, sitting en banc, held that the plaintiff, in receiving coverage under Schering's group disability benefits plan,

> did not seek the goods and services of an insurance office. Rather, [plaintiff] accessed a benefit plan provided by her private employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation.

121 F.3d at 1010. This key holding in *Ford* in no way conflicts with the holding in *Carparts*. Petitioner's attempt to manufacture such a conflict must fail. Therefore, there is no compelling reason for this Court to grant discretionary review.

III.

SECTION 501(c) OF THE ADA IS NOT IMPLICATED HERE, SINCE THE METLIFE POLICY AND SCHERING PLAN DO NOT DISCRIMINATE BASED ON DISABILITY AND THE DISPARITIES IN BENEFITS ARE NOT A SUBTERFUGE TO EVADE THE PURPOSE OF THE ADA.

Petitioner urges this Court to address the issue whether Section 501(c) of Title V of the ADA requires an insurance company to present actuarial evidence to support disability-based distinctions in its insurance policies. Contrary to Petitioner's assertions, however, this case does not implicate Title V or the Section 501(c) "safe harbor" provisions because, as previously discussed, there was no discrimination here. All Schering employees were offered the same disability insurance coverage, regardless of their condition. Disabled individuals were not charged a higher rate, denied coverage or provided less coverage than other individuals. Thus, because no disability-based discrimination occurred in this case, interpretation of Section 501(c) is not required.

Moreover, in enacting the ADA, Congress clearly did not intend to intrude into the realm of state regulation of insurance practices. Thus, Section 501(c) mandates that the statute be construed so as not to prohibit or restrict the ability of an employer or insurer to underwrite, classify or administer risks in a way that is based on or not inconsistent with State insurance law, unless a plaintiff can establish that the practice at issue is a "subterfuge" for evading the ADA. This is consistent with the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (emphasis added), which states that

> [n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by

> any State for the purpose of regulating the business of insurance . . . unless such [federal] Act *specifically relates* to the business of insurance.

Petitioner asserts that the Third Circuit misapplied the McCarran-Ferguson Act and that the reference to "Insurance" in the caption of Title V proves that the ADA "specifically relates" to insurance. (Petition, p. 12 n.1, p. 22) However, the express purpose of Title V is to *shield* insurers like MetLife from regulation under Titles I and III. *See* S. Rep. No. 116, 101st Cong., 1st Sess., at 84-85 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., at 136 (1990). As the Third Circuit correctly pointed out, the ADA does not "specifically relate" to the "business of insurance;" the statute "does not mention the term 'insurance' in its introductory section entitled 'Findings and purpose[.]' " (Pet. App., 24a) Indeed, the only reference to "insurance" in Title III is to include "insurance office" in a list of places of public accommodation. 42 U.S.C. § 12181. The mere mention of "insurance office" evidences no intent to regulate the business of insurance or the contents of insurance policies. *See also Leonard F. v. Israel Discount Bank*, 967 F. Supp. 802, 805 (S.D.N.Y. 1997) ("Congress meant to protect providers [of] insurance and their practice of providing different levels of benefits for individuals with physical and mental conditions (as a risk classification practice). The ADA does not, nor was it ever intended to regulate the business of insurance and for that reason it includes an explicit 'Safe Harbor' provision shielding traditional insurance risk classification practices from regulation under the ADA.") Thus, it is clear that the purpose of Section 501(c) is to emphasize that regulation of the terms of insurance policies should remain a state law matter as mandated by the McCarran-Ferguson Act.

Furthermore, the *Ford* court properly held that, consistent with this Court's precedent, the "subterfuge" term in Section

501(c) does not require an insurer to actuarialy justify its policy provisions. The court declined to "construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff." (Pet. App., 24a).

In *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), this Court interpreted a similar "subterfuge" provision in the ADEA[13] and specifically rejected the contention that a disparity in employee benefits not justified by actuarial cost data was a subterfuge. Since Congress used the same "subterfuge" language when it enacted section 501(c) of the ADA in 1990, after the *Betts* decision, it is presumed to have intended the phrase to be accorded the same meaning as in *Betts*. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

In following this Court's interpretation of "subterfuge", the Third Circuit agreed with the other circuits which reached the same conclusion. In *Modderno v. King*, 82 F.3d at 1064, the D.C. Circuit relied on the Supreme Court's definition of the term "subterfuge" as set forth in *Betts* and held that a $75,000 lifetime coverage limit for mental health benefits under a benefits plan was not a "subterfuge" to evade the purposes of the ADA. The court rejected the EEOC's position that an employer must provide a cost or risk-based justification for distinguishing between mental and physical disabilities in order to avoid a finding of subterfuge. *Id.* Similarly, the Eighth Circuit in *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d at 678-79, applied the *Betts* definition and held a

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13. The ADEA (prior to its amendment in 1990) had the same three part structure as the ADA: (1) it broadly prohibited age discrimination in employment contexts; (2) it provided a "safe harbor" for any bona fide employee benefit plan; and (3) it contained the clause "so long as they are not a subterfuge to avoid the purposes of [the ADEA]." ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1986).

health insurance plan was not required to present an actuarial justification for excluding fertility treatment coverage.

Petitioner's attempts to distinguish *Betts* are unpersuasive. Despite Petitioner's mischaracterization, the *Betts* Court did not rely simply on the plan's creation prior to the enactment of the ADEA as a basis for finding it was not a subterfuge for discrimination (Petition, p. 27); rather, the Court also analyzed whether, applying *Betts*, the plan discriminated in "other, non-fringe-benefit aspects of the employment relationship." 492 U.S. at 177. The Court reasoned that although the ADEA's definition of discrimination could encompass employee benefit plans, the exemption indicated a legislative intent to exclude such plans from the statute so long as they were not used as a device to discriminate in other aspects of the employment relationship. *See id.*

Thus, as Judge Alito noted in his concurring opinion, under *Betts*, to establish subterfuge Ford must show that the Schering Plan was "intended to serve the purpose of discriminating in some non-insurance-benefit aspect of her relationship with the defendants." Ford's complaint, Judge Alito continued, contains no such allegation. (Pet. App., 34a).

Further, although the ADA Section 102(b)(2) definition of "discriminate" includes participating in a contractual relationship with "an organization providing fringe benefits" that subjects a disabled individual to the discrimination prohibited by the ADA, the Section 501(c) exemption indicates a legislative intent to exclude bona fide benefit plans from regulation so long as they are not used as a device to discriminate in other non-fringe benefit aspects of the employment relationship. Indeed, in *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995), which Petitioner cites and quotes at length (Petition, pp. 25-26), the Central

District of Illinois adopted this construction of Section 501(c) and *applied* the *Betts* construction of subterfuge to a disability-based distinction in a pension plan. 887 F. Supp. at 1124-26. In doing so, the court expressly rejected the EEOC Interim Guidance on which Petitioner relies in an attempt to distinguish *Betts* (Petition, p. 28) on the ground that the Guidance was contrary to the plain language of the statute and legislative intent. *See id.*

Thus, because this case does not implicate Section 501(c), and the Third Circuit's interpretation of that section is consistent with this Court's precedent and the holdings of the other circuit courts, there is no reason to grant discretionary review.

CONCLUSION

Because the questions Petitioner raises do not present a compelling reason for review, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — STATEMENT PURSUANT TO RULE 29.6

Respondent Metropolitan Life Insurance Company has no parent company, but has the following affiliates and subsidiaries, other than wholly-owned subsidiaries:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group Inc.
AEW Management and Advisors, L.P.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Aldrich Eastman Global Investment Strategies, LLC
Aurora Limited Partnership
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
BCOP Associates L.P.
Capital Growth Management Limited Partnership
Chart House Enterprises, Inc.
Coating Technologies International, Inc.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Properties Company III, Inc.
Copley Public Partnership Holding, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors I, L.P.
Dan River, Inc.
Eclipse Claim Services Inc.

Appendix A

Eighth Copley Corp.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
Harris Associates, Inc.
Harris Associates, L.P.
Harris Associates Securities, L.P.
Harris Partners, Inc.
Harris Partners L.L.C.
Interbroker, Correduria de Reaseguros, S.A.
Jurika & Voyles, Inc.
Jurika & Voyles, L.P.
Lone Star Industries, Inc.
Loomis, Sayles & Company, Inc.
Loomis Sayles & Company, L.P.
Loomis Sayles Distributors, Inc.
Loomis Sayles Distributors, L.P.
Luther's Bar-b-q, Inc.
MC Management, Inc.
MC Management, L.P.
Mecca Software, L.L.C.
Mercadian Capital L.P.
Mercadian Funding L.P.
Met Life International Real Estate Equity Shares, Inc.
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.

Appendix A

Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Morguard Investments Limited
Nailite International, Inc.
Nef Corporation
New England Investment Companies, L.P.
New England Funds, L.P.
New England Funds Management, L.P.
New England Funds Service Corporation
Nvest, L.P.
Nvest Associates, Inc.
Nvest Companies, L.P.
Nvest Holdings, Inc.
Nvest Partnerships, LLC
Perseus Partners L.P.
Pesco Plus, L.C.
Pleiades Partners, L.P.
P.T. Metlife Sejahtera
Public Employees Equities Services Company
R&T Asset Management, Inc.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, Inc.
Reich & Tang Services, Inc.
Santander Met, S.A.
Second Income Corp.
Seguros Genesis, S.A. (Spain)
Seventh Copley Corp.
Seguros Genesis, S.A. de C.V.
Sixth Copley Corp.
Sixth Singleton Corp.
Snyder Capital Management, Inc.
Snyder Capital Management, L.P.
Spa Partners, L.P.

Appendix A

State Street Research Intermediate Bond Fund
State Street Research International Fixed Income Fund
State Street Research Strategic Portfolios: Aggressive
State Street Research Strategic Portfolios: Conservative
State Street Research Strategic Portfolios: Moderate
Stella Partners, L.P.
Third Income Corporation
Third Singleton Corporation
Vaughan, Nelson, Scarborough & Mcullough, Inc.
Vaughan, Nelson, Scarborough & Mccullough, L.P.
VNSM Trust Company
Westpeak Investment Advisors, Inc.
Westpeak Investment Advisors, L.P.
Westpeak Investment Advisors Australia Limited Pty.